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No. 96-168

In The
Supreme Court of the United States
October Term, 1995

SHAWNA SNYDER,

Petitioner,

v.

JOSEPH VIANI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's petition omits and mischaracterizes the facts giving rise to the decision sought to be reviewed, fails to present a substantial federal question, and ignores adequate state grounds for the ruling below. The petition should be denied.

STATEMENT OF THE CASE

Petitioner's action seeks to benefit the estate of a deceased minor who consumed alcoholic beverages at respondent's tavern, then visited a second tavern not a party to the action below for over five hours, after which his

vehicle crossed the center line and collided with a motor home, killing not only himself but also the four occupants of the motor home, who also are not parties to the action below. App. 2a-3a. Petitioner's action has nothing whatsoever to do with gaming in any respect.

Prior to petitioner's action below, the Nevada Supreme Court had repeatedly held that furnishing alcoholic beverages to one subsequently involved in an accident did not give rise to a cause of action for injuries suffered in the accident and that the violation of statutes regulating the sale of alcohol to underaged or intoxicated persons did not constitute negligence per se. *See, Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 844 P.2d 800 (1992) and cases cited therein. In *Hinegardner*, the Nevada Supreme Court reaffirmed its prior holdings, emphasizing that the wisdom of any change in Nevada law on this issue was for the Nevada legislature. Justices Robert Rose and Charles Springer concurred in the majority opinion in *Hinegardner*, while Justice Thomas Steffen (and another justice no longer on the court) dissented. In 1995, the Nevada legislature

enacted Nev. Rev. Stats. §41.1305, confirming that *Hinegardner* correctly perceived and reflected Nevada public policy on this issue.

At the time petitioner commenced her action below and *Hinegardner* was decided, Justice Rose had, since 1982, held an ownership interest in a corporation that owned and operated sports bars and lounges in southern Nevada. App. 108a. His ownership and holding of related liquor and gaming licenses has not only been a matter of public record, but also disclosed in numerous judicial disclosure filings with the Nevada Supreme Court since 1982. App. 108a, 122a. Justices Springer and Steffen knew of his bar ownership and neither objected to his sitting on *Hinegardner* or originally to his sitting on petitioner's appeal as they were required to do under Nevada Canon of Judicial Conduct 3(D)(1) if they truly believed his doing so was improper. App. 33a, 112a.

In addition, Justice Rose's ownership of a bar was the subject of intense and pervasive media exposure and commentary throughout Nevada during his 1988 and 1994

reelection campaigns. App. 109a-111a. As the Nevada Supreme Court observed, this "enormous publicity . . . included an entire month of television and radio commercials" encompassing "[l]iterally hundreds of radio and television commercials . . . broadcast throughout Nevada . . . just a month prior to" the Nevada Supreme Court's decision on the merits of petitioner's appeal. App. 25A. The decision sought to be reviewed also cites (and quotes) specific and detailed evidence (never refuted by petitioner's counsel) that petitioner's then counsel had actual knowledge of Justice Rose's bar ownership in June 1994, over five months prior to the decision on the merits of her appeal. App. 20a.[1]

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[1] Petitioner's Appendix to Petition for a Writ of Certiorari omits, not only exhibits to her disqualification motion relevant to the decision sought to be reviewed (see App. 79a), but also all exhibits to Justice Rose's response, including the numerous licenses and public disclosure statements, newspaper articles and radio and television commercials relied on by the Nevada Supreme Court in its decision (see App. 24a-25a) and the specific and detailed affidavit of Clark Santini expressly cited and quoted by the Nevada Supreme Court as establishing that petitioner's then counsel had

However, on July 11, 1994, more than four months prior to the Nevada Supreme Court's decision on the merits of petitioner's appeal, Justice Rose sold the corporation and the bar it owned. App. 108a. Thus, at the time the Nevada Supreme Court rendered its decision on the merits of petitioner's appeal, Justice Rose had no direct, personal, substantial, pecuniary interest in any establishment selling alcoholic beverages and no motion or other challenge to the propriety of his sitting on either *Hinegardner* or petitioner's appeal had been made. Consequently, neither disclosure nor disqualification was required since Justice Rose had no conflict of interest that raised any cognizable grounds for his disqualification from participation on petitioners' appeal. App. 111a, 112a.

In *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 256-270, 774 P.2d 1003, 1017-1026 (1989), and successfully argued by petitioner's present counsel, the

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not merely constructive but actual knowledge of Justice Rose's bar ownership in June 1994 (see App. 19a-21a). A copy of Mr. Santini's three-page affidavit is attached to this Response.

Nevada Supreme Court held that a party with actual or constructive knowledge through its counsel of grounds for disqualification of a Supreme Court Justice waives those grounds by not seeking disqualification before the Supreme Court renders its decision on the merits of the appeal. 105 Nev. at 259-260; 774 P.2d at 1019, 1026. The Nevada Supreme Court then identified a variety of challenges that had been waived in that case based on actual or constructive knowledge from political advertisements, discourse amongst attorneys, newspaper articles, public notices, etc. 105 Nev. at 261-262, 263-264 n.17, 266, 268 N.21, 270 N.22; 774 P.2d at 1020-1021, 1021-1022 n.17, 1023-1024, 1024-1025 n.21, 1026 n.22.

Subsequently, in 1990 the Nevada Supreme Court adopted Rule 35(a) of the Nevada Rules of Appellate Procedure ("NRAP") providing in relevant part as follows:

> Any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be deemed waived. In cases or proceedings before the Supreme Court of Nevada, motions and charges

> seeking the disqualification or recusal of a justice must not be based on any ground that the moving party has theretofore omitted to raise formally as soon as possible after receiving either actual or constructive notice thereof. In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered.

See, Whitehead v. Commission on Judicial Discipline, 110 Nev. 380, 422-430, 873 P.2d 946, 972-977 (1994) where Justices Springer and Steffen concurred in rejecting disqualification challenges to themselves (based in part on Federal due process grounds) as both inadequate as a matter of law and untimely under NRAP 35(a). However, in *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 894 P.2d 337 (1995), the Nevada Supreme Court recognized an exception to NRAP 35(a) where the party seeking disqualification did not know, and could not have reasonably known, the

grounds upon which disqualification was sought prior to argument on the appeal.

In the decision sought to be reviewed, the Nevada Supreme Court applied its *Ainsworth* holding to the evidence in the record in concluding that petitioner, through her then counsel, had both actual and constructive knowledge of Justice Rose's prior bar ownership before the Court's decision on the merits of her appeal. The Court then concluded that her allegations, even if true, did not amount to "fraud or like illegal conduct" so that her belated attempt to disqualify Justice Rose after the Court's decision on the merits of her appeal was barred by NRAP 35(a). Finally, the Court also held that Justice Rose did not have the requisite direct, ongoing pecuniary interest to disqualify him from sitting on her appeal and that, since petitioner's allegations did not present legally cognizable grounds for disqualification, a hearing before unchallenged justices were not required, citing *inter alia,* its *Ainsworth* and *Whitehead* decisions. App. 17a-32a.

I. <u>The Petition Fails to Present a Substantial</u>

Federal Question.

The petition cites Nevada statutes and Nevada Canons of Judicial Conduct. However, application of such standards is solely a matter of Nevada state law, which differs significantly from comparable Federal law in some respects (e.g. as to the importance of a judge's "duty to sit") even where identical language is being interpreted. *Compare, Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) with *PETA v. Bobby Berosini, Ltd., supra, Ainsworth v. Combined Ins. Co., supra,* and *In re Petition to recall Dunleavy*, 104 Nev. 784, 788-791, 769 P.2d 1271, 1273-1276 (1988). Disqualification of state justices on Federal due process grounds must satisfy much more stringent requirements. *See, Aetna Life Ins. Co. V. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986).

In *Lavoie*, this Court observed that "the traditional common-law rule was that disqualification for bias or prejudice was not permitted," and quoted from its prior

decision in *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441 (1927) in holding that "not all questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." 475 U.S. at 820, 106 S.Ct. At 1584 (internal quotation marks omitted). Consequently, the Court held that "only in the most extreme of cases would disqualification on [the basis of bias or prejudice] be constitutionally required." 475 U.S. at 821, 106 S.Ct. At 1585.[2]

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[2] Therefore, petitioner's reliance on a letter signed by four bar managers (including the manager of Justice Rose's bar) under their own logos (App. 46a-48a) recommending Justice Rose for reelection and expressing their opinion as to his understanding of the gaming/liquor industry and the significance of *Hinegardner* and other prior decisions is unavailing. Even a judge's critical comments on present issues based on past cases rarely, if ever, provide statutory grounds for disqualification, *Liteky v. U.S., supra*, much less constitutional grounds, *see, Aetna Life Ins. Co. V. Lavoie, supra*, 475 U.S. at 820-821, 106 S.Ct. At 1584-1585 (judge's hostile comments regarding insurance industry's claims payment practices not grounds for disqualification).

However, in *Lavoie* the Court held that due process is implicated where a judge has a "direct, personal, substantial, pecuniary interest" in the outcome of a case that offers a "possible temptation" to the average judge "not to hold the balance nice, clear and true." 475 U.S. at 822, 106 S.Ct. At 1585, quoting *Tumey* and *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972). Specifically, in *Lavoie*, the Court vacated a 5-4 state supreme court decision first recognizing tortious injury and multi-million dollars punitive damage liability in an insurance bad-faith case where one of the majority justices had filed two pending insurance bad faith actions, one a class action on behalf of state employees. Significantly, however, the Court held that the other justices of the court were not disqualified, despite being putative members of the class, characterizing their interest as "highly speculative and contingent." 475 U.S. at 826, 106 S.Ct. At 1588.

Here, petitioners' action did not concern Justice Rose's establishment in any way, and Justice Rose had not filed, and was not a party to, any litigation comparable to

Petitioner's action. App. 26a.-27a. Unlike *Lavoie*, the law relevant to petitioner's action was well-settled by prior decisions, including one in which Justice Rose had participated without objection. Thus, even prior to July 1994, Justice Rose wholly lacked any direct, personal, substantial, pecuniary interest in the outcome of petitioner's case. His "interest" was comparable to that of a judge owning and using an automobile who rules on automobile products liability, insurance and negligence issues. His insurance costs might be affected and his net worth might increase or decrease depending on future events, but that is hardly the direct, personal, substantial pecuniary interest in the outcome of a particular case required for disqualification on due process grounds.

At the time of the decision on the merits of petitioner's appeal, however, Justice Rose's "interest" was even less. He had sold his ownership interest in the corporation that had owned a bar and thus had no pecuniary interest whatsoever in the outcome of petitioner's action. Speculation that Justice Rose might benefit from lower

insurance costs if the purchaser defaulted and if Justice Rose had to enforce his security interest in the corporation's stock is precisely the sort of remote, indirect, speculative and contingent interest squarely rejected as sufficient for disqualification on due process grounds in *Lavoie*. Future events could cause a judge's rulings to work to his/her benefit or detriment on virtually any aspect of their personal or business affairs. Judges simply could not function if that prospect was sufficient for disqualification. The petition fails to present a substantial federal question.

II. The Decision Below Rests on Adequate State Grounds.

A state supreme-court decision rests on adequate state grounds where assertion of a Federal constitutional right is barred as untimely under a pre-existing state procedural rule given general application that has been applied without discrimination against Federal claims, especially where the state procedural rule serves a legitimate state interest. *See, Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991); *Henry v. State of Mississippi*, 379

U.S. 443, 85 S.Ct. 564 (1965); *Wolfe v. State of North Carolina*, 364 U.S. 177, 80 S.Ct. 1482 (1960).

Here, NRAP 35(a) unquestionably serves a legitimate state interest, barring the after-the-fact judge shopping petitioner has undertaken below by securing new counsel and filing a motion to disqualify after rendition of a 3-2 decision on the merits of her appeal in a transparent attempt to change the decision by changing the composition of the court. Despite petitioner's highly-selective inclusion and exclusion of materials from the record below in her Appendix to Petition for a Writ of Certiorari, the Nevada Supreme Court's finding that petitioner's prior counsel had both actual and constructive knowledge of the grounds allegedly disqualifying Justice Rose months prior to its decision on the merits of her appeal is fully sustained by the evidence cited in the decision sought to be reviewed. Consequently, NRAP 35(a) is fully applicable here and provides adequate state grounds sustaining the result reached below. *See, Allum v. Valley Bank of Nevada*, 112 Nev. 591, 915 P.2d 895 (1996).

III. <u>The Ultimate Issue to be Decided is Moot</u>.

Since Article III of the Constitution limits the exercise of judicial power by requiring an actual "case" or "controversy", the federal courts, and more specifically, the United States Supreme Court, must refrain from deciding any case in which subsequent events have resolved the pending issues. *See, North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971); *Dinsmore v. Southern Express Co.*, 183 U.S. 115, 46 L.Ed. 111, 22 S.Ct. 45 (1901); *Pennsylvania v. Whelling & Belmont Bridge Co.*, 15 L.Ed.1st 421 (1856), also see S.C. 18 How., 421. In fact, the Supreme Court lacks jurisdiction to decide moot questions. *North Carolina v. Rice, supra.*

In the underlying civil matter which gives rise to the instant Petition, the plaintiff brought suit to recover for injuries which were allegedly caused by the service of alcohol to a minor. However, prior to this suit, the Nevada Supreme Court had on no less than five (5) occasions reaffirmed the common law rule which refused to recognize a cause of action arising out of the sale or furnishing of

intoxicating beverages. *See, Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 1093, 844 P.2d 800 (1992). In so doing, the Nevada Supreme Court expressly stated that any change in this fundamental common law rule would have to come about as a result of a legislative rather than judicial function. *See, Hinegardner v. Marcor Resorts, supra*, at 1096.

In 1995, the Nevada legislature enacted N.R.S. 41.1305 which expressly and specifically precluded any action such as that filed by the plaintiff in the underlying matter. Rather than abrogating the common law immunity, the Nevada legislature expressly reaffirmed the long-standing common law rule.

Following the enactment of 41.1305, the uncertainty which followed the Nevada Legislature's silence on the issue was eliminated. The smallest of openings which had been left open by the Nevada Supreme Court's repeated reference to deferral to the legislature was gone. The Nevada legislature expressly rejected the possibility of exposing a provider of alcohol to civil liability thus

resolving any potential issue which might ultimately face the Nevada Supreme Court.

By enacting N.R.S. 41.1305, the Nevada Legislature has rendered moot any claim which the plaintiff might present in the underlying matter. As such, even if this Court were to grant certiorari and ultimately reverse the Nevada Supreme Court's decision on the post-decision motion to disqualify Justice Rose, the Nevada court's decision would necessarily be the same as that which is the subject of the instant challenge. Clearly the issue has been rendered moot by the actions of the Nevada Legislature.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

COMES NOW, Clark Santini, and being duly sworn, deposes and says:

1. I am a native Nevadan presently residing in Washoe County.

2. My primary employment as an adult has been as an investigator in the State of Nevada; first, as an investigator with the Clark County District Attorney's office, and then many years as an assistant chief investigator with the Gaming Control Board. In addition to employment as a public investigator, I have worked as a hearing officer and administrative law judge for six years (three years for Gaming Control, two years for the Equal Rights Commission, and one year in the Employment Security appeals office) and as a Chief Tribal Judge in the court of general jurisdiction for the Paiute tribe at Nixon, Nevada. I have also worked the past twenty years as a political and

public relations consultant.

3. In early June, 1994, attorney Ken McKenna, of Washoe County, asked to meet with me concerning some political advice about his running for a political office in Washoe County. I met with him for a lengthy lunch at the Holiday Hotel in Reno, Nevada, on June 6, 1994.

4. During that meeting, he informed me he was seriously considering running for a political office in Washoe County and wanted to retain me as his political consultant for the campaign. During this meeting, we discussed a variety of matters concerning his candidacy.

5. Near the end of our meeting, he was discussing his law practice and the fact that he had three important legal cases from the Hawthorne area. He voluntarily discussed all three briefly. The first involved the Sheriff and his office and the fact that the Sheriff or his deputies had killed a man's girlfriend when attempting to serve a subpoena or warrant on him. McKenna told me he had gotten a large settlement in this case. The second was a case involving a minor who was served liquor at Joe Viani's

bar and then killed himself and others in an automobile accident thereafter. McKenna indicated he had lost the case in district court but had appealed it to the Nevada Supreme Court. He indicated that he was uncertain about the Supreme Court result and elaborated. McKenna stated that he knew Justice Steffen was a Mormon and always voted against the bars in these types of cases, but McKenna said he did not know how he would fare with Justice Rose because he knew Justice Rose owned a bar in Las Vegas. However, he gave me the impression that he did not necessarily think Justice Rose would be biased. It was unmistakable that Ken McKenna knew in June, 1994, that Justice Rose owned a bar in Las Vegas. The last case evolved from the Mineral County District Attorney having delayed in filing a sexual assault case involving a 15-year-old girl for what McKenna believed were political reasons.

6. It was agreed that Ken McKenna would send me a check for my consultation, and he did so with a check dated June 13, 1994. A copy of that check is attached.

7. By mid-July, 1994, McKenna advised me he no

longer needed any political consulting services from me. I later did political consulting services for Justice Bob Rose in Washoe County for his campaign for re-election.

8. On February 22, 1995, I read the Reno News & Review newspaper and the article about the Joe Viani case and the attempt to disqualify Justice Rose. When I read the part about the driver's estate and Ken McKenna claiming to be totally unaware that Justice Rose owned a bar in Las Vegas prior to the decision, I knew it was not true as regarding McKenna and phoned Justice Rose to tell him that. I informed him of the facts as related to this affidavit and offered to sign an affidavit to that effect.

9. The above facts are true and correct to the best of my knowledge.

/s/ Clark Santini

SUBSCRIBED AND SWORN to
before me this 3rd day of March, 1995.

/s/ Susan C. Davis
Notary Public